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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of) MM Docket No. 96-104
)
SOUTHWESTERN BROADCASTING)
CORPORATION) File No. BRH-900315UC
)
For Renewal of License)
for Station KLZK(FM))
Brownfield, Texas)

DOCKET FILE COPY ORIGINAL

To: The Commission

MASS MEDIA BUREAU'S REPLY TO EXCEPTIONS

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Summary

The Summary Decision correctly concluded that Southwestern Broadcasting Corporation's ("Southwestern") extreme dilatoriness warranted denial of Southwestern's application for renewal of license of Station KLZK(FM), Brownfield, Texas. In granting the Mass Media Bureau's ("Bureau") counter-motion, the ALJ found that Southwestern failed to demonstrate through its prior record that it has the capability and intent to expeditiously resume Station KLZK(FM)'s broadcast operations; and that Southwestern voluntarily violated Sections 73.1740 and 73.1750 of the Commission's Rules for having allowed Station KLZK(FM) to remain silent without Commission authority since it became the licensee.

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MASS MEDIA BUREAU'S REPLY TO EXCEPTIONS

Preliminary Statement

1. The Mass Media Bureau, pursuant to Sections 1.276 and 1.277 of the Commission's Rules, hereby replies to certain exceptions in the brief of Southwestern Broadcasting Corporation ("Southwestern") filed on August 28, 1996, to the Summary Decision of Administrative Law Judge Richard L. Sippel, FCC 96-104, released July 29, 1996 ("Summary Decision" or "SD"). The failure of the Bureau to comment on any other exception or argument should not be construed as a concession on the Bureau's part as to the correctness or accuracy of those exceptions or arguments.

Counterstatement of the Case

2. By Hearing Designation Order ("HDO"), DA 96-657, released April 29, 1996, the Bureau, through its Assistant Chief, Audio Services Division, designated the captioned renewal application for hearing to determine whether Southwestern has the capability and intent to expeditiously resume the broadcast operations of Station KLZK(FM), Brownfield, Texas, consistent with the Commission's rules; and whether Southwestern has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules. In designating these issues, the Bureau found that substantial questions had been raised by Southwestern's failure to return the station to the air in the almost six years since it acquired the facility in 1990. HDO at para.

5. Specifically, the Bureau noted Southwestern's failure to file a promised construction

permit application simultaneously with a petition for rulemaking to resolve short-spacing problems involving Lamesa, Texas, FM Stations KMMX(FM) and KIOL-FM. Finally, the Bureau noted that Southwestern itself had cited financial considerations and its loss of a tower site as the reasons it had not returned to the air. HDO at para. 4.

3. Both parties, in their respective requests for summary decision, agreed that the facts of this case were not in dispute, but that only the legal significance which should be properly accorded those facts remained at issue. Southwestern contended that it could not return Station KLZK(FM) to the air because authorizations issued by the Commission to KMMX(FM), Lamesa, Texas, KIOL-FM, Lamesa, Texas, and KKYN-FM, Plainview, Texas, prevented Southwestern from implementing an upgrade to Channel 282C2, or downgrading to Channel 282A, or restoring operation on its licensed frequency of Channel 280A. The Bureau contended, however, that Southwestern's assertions were not supported by the facts or the law. The Summary Decision found that Southwestern failed to demonstrate through its prior record that it had the capability and intent to expeditiously resume Station KLZK(FM)'s broadcast operations; and that Southwestern voluntarily violated Sections 73.1740 and 73.1750 of the Commission's Rules for having allowed Station KLZK(FM) to remain silent without Commission authority since it became the licensee.

Questions Presented

Whether due process requires that the Commission grant the KLZK(FM) Channel 282C2 upgrade application?

Whether the Commission provided Southwestern with adequate notice that KLZK(FM) could resume operations during the period the station was silent?

Whether Southwestern's failure to request Commission authorizations mutually exclusive to existing authorizations was an appropriate basis for denial of KLZK(FM)'s license renewal?

Argument

The Bureau's refusal to process the KLZK(FM) Channel 282C2 upgrade application was appropriate in this case and consistent with the requirements of due process.

4. Southwestern takes exception to matters unrelated to the Summary Decision in this case in asking the Commission to reverse the Bureau's determination not to process its post-designation filed modification application. Southwestern for the first time argues that "due process" considerations now warrant reversal based on alleged inconsistencies in the staff's processing of Southwestern's original construction permit¹ as well as the staff's refusal to process the proposed modification application, which Southwestern claims that the Bureau promised to do during the first Prehearing Conference.² These contentions are meritless.

5. The record demonstrates that at the first Prehearing Conference, held June 6, 1996, Southwestern's and Bureau counsel indicated that discussions respecting possible negotiation

¹Refers to application to upgrade from Channel 280A to 282C2 under File No. BPH-891026IC, which was dismissed by the staff on March 17, 1992.

²We note that Southwestern's proposed modification application filed post-designation (File No. BPH-960508IA) was dismissed by the Bureau's Audio Services Division on August 5, 1996. That application was appropriately disposed of in view of the ALJ's July 29, 1996 summary decision, which denied the license renewal application and cancelled the station's underlying license.

Southwestern's and Bureau counsel indicated that discussions respecting possible negotiation leading to a consent order under Section 1.93-1.94 of the Commission's Rules had taken place. Tr. 3-4. Further discussion ensued concerning the substance of a proposed consent order. Tr. 5-13. In connection therewith, the subject of the Commission's Public Notice, DA 96-818, released May 22, 1996, entitled "Procedure Announced for Expedited Processing of Applications Filed by Silent Broadcast Stations" was also discussed.³ Tr. 13. Bureau counsel advised that, due to KLZK(FM)'s protracted silence, it appeared that Southwestern would be among those licensees who would need to seek expedited processing of their proposed modification applications in order to return their stations to the air prior to the February 1997 automatic license expiration date established for silent stations. Tr. 13-14. Bureau counsel also noted that the Public Notice made clear that the burden to seek and obtain such processing was entirely upon the licensees, and that "as a matter of law the staff's inability to act on any application within a specific time cannot prevent license expiration nor give rise to any equitable claim [whether] the license term should be extended." Tr. 16-17; Tr. 19. In response to the ALJ's inquiry whether cooperation would be extended to Southwestern if it sought expedited processing of its proposed modification application, Bureau counsel advised only that he would subsequently alert the Bureau's processing division of Southwestern's request, and otherwise "assist both the Judge and opposing counsel in the way that's appropriate in this matter." Tr. 19-21.

³In the Public Notice, the Commission noted that recent legislation, Section 403(1) of the Telecommunications Act of 1996, 47 U.S.C. Sec. 312(g), provided for the automatic expiration on February 9, 1997 of the license of any station which had been silent for the preceding 12 consecutive months. The Public Notice established procedures for the processing of applications necessary to return silent stations to the air prior to the automatic expiration date.

6. At the second Prehearing Conference, convened June 26, 1996, Bureau counsel reported that expedited processing would not be afforded in this case, because such processing is not afforded those whose applications were first proffered, as here, post-designation. Tr. 25-26. Counsel also indicated, that to the extent that Southwestern was unable to resume broadcasting without reference to the modification application in question, that the "underlying predicate for negotiation and settlement" no longer existed. Tr. 28. In response to his request, the Bureau thereafter articulated for the ALJ the specific application processing policy at issue in a Memorandum of Law and Policy, wherein the Bureau stated:

Under existing policy, the Bureau will not process a modification application filed after a silent station is designated for hearing. ---. The Commission's Public Notice is a narrow exception to the Bureau's existing policy -- not applicable here.

In the intervening period between the first and second Prehearing Conferences, the Bureau did not arbitrarily change its position respecting whether Southwestern would be afforded expedited processing, as Southwestern alleges, and therefore inappropriately cancel negotiations. Rather, the Bureau's decision not to pursue further negotiations with Southwestern was based on its careful determination that Southwestern's application was not entitled to expedited processing.

7. Contrary to Southwestern's further allegation, the staff did not deny Southwestern "due process" by changing existing policy or creating new policy in its decision to designate the renewal application for hearing Cf. Cavan Communications, Inc., 10 FCC Rcd 2873 (ALJ 1995). In Cavan, the Bureau allowed the licensee of a silent AM radio station to file and the Bureau processed a Form 302 license application after license revocation proceedings

had commenced. The processing of that post-designation license application, however, was performed in order to ensure that the already constructed facility would operate in conformance with Commission technical rules and policies which prohibit the creation of new objectionable interference by AM broadcasters.⁴ Where a station has been silent for more than six months, as in Cavan, the Commission has required AM licensees to file such "proofs" under a license to cover application to affirmatively demonstrate that reactivation of the station's facilities would not create new objectionable interference.

8. This is wholly different from Southwestern's situation, where its return to the air could not first occur until it had filed a modification application to construct a broadcast facility, received Commission approval of that application, and constructed a modified facility in accordance therewith -- an often lengthy and difficult enterprise, requiring the participation of the staff at many levels until completion of the construction process. In this situation, the staff appropriately determined that expedited processing should not be afforded those applicants, such as Southwestern, who, through their own dilatoriness, had not even taken the initial step of filing an application until their underlying licenses had been designated for hearing. Moreover, the rendering of this determination is consistent with the latitude afforded by the Commission to its staff. See Horne Industries, Inc., 91 FCC 2d 1193, 1196 (Rev. Bd. 1982) (citing scholarly article observing that the staff "is expected to apply existing law rather than make new policy, although of necessity it may consider the extension of present

⁴ Section 73.61(c) of the Commission's Rules allows the staff to request any AM station to make partial-proofs-of-performance "whenever there is an indication that the [station's] antenna is not operating as authorized," in order to protect other stations from the creation of new objectionable interference.

policies to include new factual situations").⁵

The Commission provided Southwestern with adequate notice that KLZK(FM) could resume operations during the period the station was silent.

9. The Summary Decision concluded that Southwestern's long failure to return KLZK(FM) to the air as a Class A station on Channel 280 or 282, or, alternatively, to file an application to upgrade to Channel 282C2, was due to Southwestern's own dilatory conduct in failing to timely pursue the technical options available to it. Southwestern now argues that it was never adequately "informed . . . of these options." Exceptions at 13. In this regard, Southwestern refers to the fact that a copy of the Report and Order, 4 FCC Rcd 8788 (MMB December 27, 1989) ("1989 rulemaking") was delivered only to KLZK(FM)'s then-licensee, but not to any principal of Southwestern.

10. Southwestern's argument is without merit. When the 1989 rulemaking was released, Southwestern was not affected since it was since it did not acquire the station until July 1990. Thus, it was not entitled to personal notice. In any event, Southwestern ultimately had constructive notice of the 1989 rulemaking.⁶ See, e.g., 220 Television, Inc., 81 FCC 2d 575, 577 (1980) ("interested persons have the obligation to ascertain facts from official

⁵ Quoting Freedman, "Review Boards in the Administrative Process," U. of Pennsylvania L.R., 546, 559 (1969).

⁶Southwestern's present concession that it was unaware of the KKYN-FM, Plainview, Texas, rulemaking at the time it acquired KLZK(FM) -- and therefore unprepared to take the necessary steps to expeditiously restore the broadcast operations of the then-silent facility -- further supports the Summary Decision by revealing Southwestern's consistent lack of any capability or intent to return the station to the air.

Commission records . . .").

11. Southwestern also contends that the Summary Decision was flawed in failing to consider the lack of notice given to Southwestern by the Bureau as to the consequences of KLZK(FM)'s protracted silence. Southwestern argues that it was somehow incumbent upon the Commission's staff to specifically notify a licensee during the tenure of its license term that its interim failure to restore station operations might jeopardize grant of its license renewal application. However, the cases cited by Southwestern require only that the Commission, in designating an application for hearing, pursuant to 47 U.S.C. Sec. 309(e), must specify "with particularity the matters and things in issue but not including issues or requirements phrased generally."⁷ That notice was satisfied in this case when the license renewal application was designated for hearing upon the issue, inter alia, whether Southwestern had the "capability and intent to expeditiously resume broadcast operations . . . consistent with Commission requirements," in view of the station's protracted silence. In this regard, the HDO specifically arrayed the factual background of the case as it related to the specified issue so that Southwestern would have adequate notice in order to prepare for hearing, and it was appropriate for the case to be determined on these issues. Cf. A.C. Elliott, Jr., 36 RR 2d 1521 (Rev. Bd. 1976) (further proceedings warranted where meaning of governing standard respecting the applicant's conduct of its ascertainment survey was unclear --the Review Board noted that it would be unfair to deny an application on the basis of

⁷Southwestern cites generally Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1971), cert. denied, 403 U.S. 923 (1971); Salzer v. FCC, 778 F.2d 869, 875 (D. C. Cir. 1976); Maxell Telecom Plus Inc. v. FCC, 815 F.2d 1, 3 (D.C. Cir. 1987); Satellite Broadcasting Corp. v. FCC, 824 F.2d 1, 3-4 (D.C. Cir. 1987).

deficiencies not noted in the designation order); accord, Bamford v. FCC, 535 F.2d 78 (D.C. Cir. 1976), cert. denied, 429 U.S. 895 (1976).⁸

Southwestern's failure to request Commission authorizations mutually exclusive to existing authorizations was an appropriate basis for denial of KLZK(FM)'s license renewal.

12. Southwestern submits that the Summary Decision ignored or mischaracterized the significance of the "conflicting" technical special temporary authorities ("STAs") or other Commission actions taken in this case. Southwestern contends that through either the 1989 rulemaking or the issuance of STAs to KMMX, Lamesa, Texas, and KIOL, Lamesa, Texas, "the Commission had taken other actions which effectively prevented resumption of operation as a Class A station as either a Class A or C2 station on Channel 282." Exceptions at 14. Southwestern is mistaken. In the 1989 rulemaking, Station KKYN-FM was authorized, effective December 1990, to change frequencies and upgrade from Channel 280A to Channel 280C1. This upgrade ultimately precluded KLZK(FM)'s resumption of service on its authorized Channel 280A. The 1989 rulemaking, however, noting Station KLZK(FM)'s silence and its plan to vacate Channel 280A through its then-pending Channel 282C2 upgrade application, specifically provided that KLZK(FM) "could continue or reestablish operation" on Channel 280A at any time until the KKYN-FM upgrade construction permit (File No. BPH-

⁸Moreover, even though it had no duty to provide prior notice, the staff, in its December 3, 1992 letter, specifically directed Southwestern to restore the station's operation or to file an acceptable Channel 282C2 upgrade application. See Exhibit I to Southwestern's Motion for Summary Decision. The staff also specifically warned that the failure to respond to such query "may lead to the eventual revocation of [KLZK-FM's] license and permit and cancellation of its call letters."

901113IA) was issued. The 1989 rulemaking also contemplated that KLZK(FM) could thereafter alternatively pursue its Channel 282C2 upgrade or file an application to downgrade to Channel 282A in lieu of operating on Channel 280A. 4 FCC Rcd at 8788. Southwestern was therefore free to restore service on Channel 280A at any time from July 1990 until April 28, 1992, the date on which the KKYN-FM construction permit was issued, but it chose not to do so. The Summary Decision correctly noted the significance of this chronology in concluding how Southwestern's inaction foreclosed its options. SD at 3-5.

13. The Summary Decision also properly found that Southwestern was, after April 28, 1992, free to pursue a downgrade to Channel 282A, but never pursued that alternative. SD at 3, para. 6. Of further significance is the fact that at the time KKYN-FM's construction permit was ultimately issued, KLZK(FM)'s Channel 282C2 upgrade application had been dismissed on March 17, 1992, by the Audio Services Division as technically deficient due to its short-spacing to the licensed facilities of Station KKKI(FM). See Exhibit H to Southwestern's Motion for Summary Decision. No appeal of that dismissal was taken, nor was a corrected Channel 282C2 upgrade application or alternative downgrade application for Channel 282A ever filed by Southwestern prior to designation of the instant license renewal application for hearing.

14. Consequently, Southwestern's failure to take any affirmative remedial action during this period, to restore service on Channel 280A, or to timely ensure the viability of its Channel 282C2 upgrade proposal, or to pursue a downgrade to Channel 282A, revealed its

lack of commitment to restoring broadcast service on Station KLZK(FM). The Summary Decision properly concluded that it was this lack of commitment, and not the Commission's grant of the KKYN-FM application, that was responsible for Southwestern's failure to restore broadcast operations on Station KLZK(FM). SD at 4-6.

15. With regard to the purportedly preclusive STAs for both Lamesa Stations KMMX(FM) and KIOL-FM, Southwestern ignores Commission policy, which favors upgrade proposals over modification applications and STAs. SD at 6, para. 17. As the Summary Decision properly noted, Section 73.1635(b) of the Commission's Rules provides that "STA[s] may be modified or cancelled by the FCC without prior notice or right to hearing." SD at 4, para. 10, n.3. Here, upon discovering that the KIOL-FM and KMMX(FM) STAs were short-spaced with KLZK(FM)'s Channel 282C upgrade proposal, Southwestern, rather than requesting revocation of those STAs, proposed a facilities-exchange between KLZK(FM) and KMMX(FM). See Exhibit G to Southwestern's Motion for Summary Decision. For the next three years Southwestern did nothing towards returning KLZK(FM) to operational status.⁹ Finally, in a letter dated December 1, 1993, the Commission's staff concluded that the short-spacing problems were not going to be resolved expeditiously by private negotiation, and cancelled the KMMX(FM) and KIOL-FM modification applications and associated STAs. In light of these actions, Southwestern could have resumed broadcast operations on KLZK(FM)

⁹During that period, on December 3, 1992, the Commission's staff inquired specifically about KLZK(FM)'s operational status, and directed it to restore operation as a Class A facility or request further silent-authority in conjunction with the filing of an acceptable Channel 282C2 upgrade application. See Exhibit I to Southwestern's Motion for Summary Decision. Although Southwestern sought further silent-authority, no Channel 282C2 upgrade application was ever filed during that period.

or pursued its Channel 282C2 upgrade without further delay, but it did not. See Exhibit A to Southwestern's Motion for Summary Decision.¹⁰

16. Finally, Southwestern contends that KLZK-FM's "protracted silence does not afford a basis for concluding that Southwestern lacked the capability and intent to resume operations," citing Video Marketing Network, Inc., 10 FCC Rcd 7611 (MMB 1995), where the renewal licensee was not designated for hearing in spite of its protracted and unauthorized silence of four years. However, in Video Marketing Network, Inc., the licensee had recommenced broadcast operations, admitted its violation of Section 73.1740, and had been sanctioned for its contravention of that rule during the pendency of the license renewal application. Thus, no issue remained warranting designation.¹¹ In any event, contrary to Southwestern's contention, the Summary Decision did not determine that Southwestern lacked the capability and intent to resume broadcast operations based on the *mere fact* of KLZK(FM)'s protracted silence, but instead considered Southwestern's *reasons for not resuming operations* in appropriately concluding that grant of its license renewal application was not warranted.

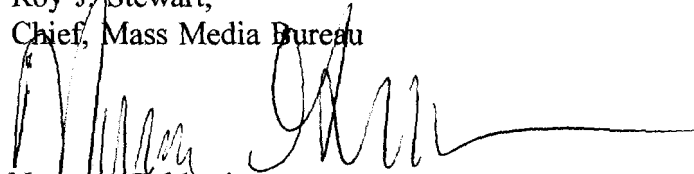
¹⁰The Summary Decision also properly noted that implementation of KLZK(FM)'s Channel 282C2 upgrade held higher priority than KMMX(FM)'s modification application and associated STA. See Summary Decision at 6, para. 17; Exhibit A, pg. 3; see also Conflicts Between Applications and Petitions for Rulemaking, 7 FCC Rcd 4917, n.3 (1992) (noting that such priority has been Commission policy since the preparation of the original Table of FM Allotments in 1962).

¹¹See also Cavan Communications, Inc., *supra*; Keyboard Broadcast Communication, 10 FCC Rcd 4489 (MMB 1995) (in which cases summary judgment in favor of the grant of license renewal, coupled with forfeitures, were found to be appropriate where licensees recommenced broadcasting during the course of their respective hearings).

Ultimate Conclusion

17. For the reasons stated, Southwestern's exceptions to the Summary Decision must be denied.

Respectfully submitted,
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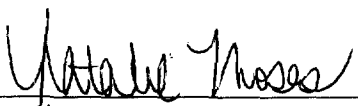
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CERTIFICATE OF SERVICE

Natalie Moses, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 9th day of September 1996, sent by regular United States mail, U.S. Government frank, copies of the foregoing "**Mass Media Bureau's Reply to Exceptions**" to:

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